92-1717

Supreme Court, U.S.
FILED
APR 2 1993

No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1992

BROWN & ROOT, INC., PETITIONER

v.

STEPHEN A. MISTICH, RESPONDENT

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

PETITION FOR A WRIT OF CERTIORARI

JAMES F. HOLMES
ELLEN B. WOODY
Christovich & Kearney
2300 Pan American Life Center
601 Poydras St.
New Orleans, LA 70130
(504) 561-7300

ANDREW L. FREY
Counsel of Record
LAWRENCE S. ROBBINS
GARY A. WINTERS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602
Counsel for Petitioner Brown & Root, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether punitive damages are available under the general maritime law in a seaman's unseaworthiness action against his employer.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Brown & Root, Inc. provides the following corporate information. The original defendant in this action was Brown & Root, Inc. On December 31, 1989, Brown & Root, Inc. merged into Brown & Root I, Inc., a Delaware corporation. Brown & Root I, Inc., is wholly owned by Brown & Root Holdings, Inc., which in turn is wholly owned by Halliburton, Inc. In the 1989 merger, Brown & Root Holdings, Inc., assumed certain liabilities of Brown & Root, Inc., including any liability in this case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	5
A. The Court Of Appeal's Decision Is Squarely In Conflict With Those Of Other Lower Courts Holding That Punitive Damages Are Not Available In Unseaworthiness Actions Brought By Or On Behalf Of Jones Act Seamen	6
B. The Decision Below Is Inconsistent With *Miles*	14
C. The Question Presented Is One Of Recurring Importance To The Maritime Industry	19
CONCLUSION	20
APPENDIX A	1a
APPENDIX B	36a
APPENDIX C	37a
APPENDIX D	38a
APPENDIX E	41a

TABLE OF AUTHORITIES

Cases Page

Anderson v. *Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992) 7, 11
Baptiste v. *Superior Court*, 106 Cal. App. 3d 87, 164 Cal. Rptr. 789 (1980) 9
Bergen v. *F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987), cert. denied, 493 U.S. 871 (1989) 10
Brown v. *State of Alaska*, 816 P.2d 1368 (Alaska 1991) 8
Brumfield v. *Zapata Gulf Marine Corp.*, No. 90-1319, 1991 WL 174818 (E.D. La. Aug. 28, 1991) 7
City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) 19
Complaint of Aleutian Enter., Ltd., 777 F. Supp. 793 (W.D. Wash. 1991) 7, 11
Cortes v. *Batlimore Insular Line, Inc.*, 287 U.S. 367 (1932) 12
Davis v. *Penrod Drilling Corp.*, No. 91-1458, 1991 WL 264541 (E.D. La. Dec. 2, 1991) 9
Day v. *Woodworth*, 54 U.S. (13 How.) 363 (1852) 19
Donaghey v. *ODECO*, No. 90-0163, 1991 WL 99493 (E.D. La. June 5, 1991), rev'd on other grounds, 974 F.2d 646 (5th Cir. 1992) 7
Ellison v. *Messerschmitt-Bolkow-Blohm*, 807 F. Supp. 39 (E.D. Tex. 1992) 7
Evich v. *Morris*, 819 F.2d 256 (9th Cir.), cert. denied, 484 U.S. 914 (1987) 9
Fitzgerald v. *United States Lines Co.*, 374 U.S. 16 (1963) 19
Haltom v. *Lykes Bros. S.S. Co.*, 771 F. Supp. 179 (E.D. Tex. 1991) 7
Hannon v. *Waterman S.S. Corp.*, No. 90-1175, 1991 U.S. Dist. LEXIS 6823 (E.D. La. May 21, 1991) 9
Harper v. *Zapata Off-Shore Co.*, 741 F.2d 87 (5th Cir. 1984) 13
Hines v. *J.A. Laporte, Inc.*, 820 F.2d 1187 (11th Cir. 1987) 13

TABLE OF AUTHORITIES—Continued

Page

Holmes v. *J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984) 13
Howard v. *Atlantic Pac. Marine Corp.*, No. 89-3073, 1992 WL 55487 (E.D. La. Feb. 28, 1992) .. 7
In re Marine Sulphur Queen, 460 F.2d 89 (2d Cir.), cert. denied, 409 U.S. 932 (1972) 9
In Re Merry Shipping, Inc., 650 F.2d 622 (5th Cir. 1981) ..... *passim*
Incandela v. *American Dredging Co.*, 659 F.2d 11 (2d Cir. 1981) 13
Jenkins v. *Kerr-McGee Corp.*, 613 So. 2d 1097 (La. Ct. App. 1993) 8
Kopczynski v. *The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), cert. denied, 471 U.S. 1136 (1985) .. 4, 11, 17
Kozar v. *Chesapeake & Ohio Ry.*, 449 F.2d 1238 (6th Cir. 1971) 17
Kraljic v. *Berman Enters., Inc.*, 575 F.2d 412 (2d Cir. 1978) 13
La Voie v. *Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827 (D. Haw. 1992) 7, 14
Logue v. *Tidewater, Inc.*, No. 91-1109, 1992 WL 59409 (E.D. La. Mar. 17, 1992) 9
Matter of Mardoc Asbestos Cases, 768 F. Supp. 595 (E.D. Mich. 1991) 7
Matter of Waterman S.S. Corp., 780 F. Supp. 1093 (E.D. La. 1992) 7, 11
McMonagle v. *Northeast Women's Center, Inc.*, 493 U.S. 901 (1989) 10
Memphis Community School Dist. v. *Stachura*, 477 U.S. 299 (1986) 19
Michigan Cent. R.R. v. *Vreeland*, 227 U.S. 59 (1913) 17, 18
Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990) .... *passim*
Miller v. *American President Lines, Ltd.*, Nos. 91-3602/3837 (6th Cir. Mar. 23, 1993) ..... *passim*
Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) 15
Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) 15

TABLE OF AUTHORITIES—Continued

Page

Morales v. *Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987) 13
Nelsen v. *Research Corp. of Univ. of Hawaii*, 805 F. Supp. 837 (D. Haw. 1992) 14
Pacific Mut. Life Ins. Co. v. *Haslip*, 111 S. Ct. 1032 (1991) 18, 19
Protectus Alpha Navigation Co., Ltd. v. *North Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985) 9-10
Ridenour v. *Holland Am. Line Westours, Inc.*, 806 F. Supp. 910 (W.D. Wash. 1992) 14
Robinson v. *Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973) 12, 13
Rollins v. *Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991) 7, 11
Rowan Cos. v. *Badeaux*, Nos. 90-0370/0756, 1991 WL 175541 (E.D. La. Aug. 29, 1991) 7
Rubeck v. *Huffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978) 18
Ryan v. *Transworld Drilling Co.*, No. 91-1110, 1991 WL 278674 (E.D. La. Dec. 20, 1991) 7
Sample v. *Johnson*, 771 F.2d 1335 (9th Cir. 1985), cert. denied, 475 U.S. 1019 (1986) 13
Self v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988) 9
Sky Cruises, Ltd. v. *Andersen*, 592 So. 2d 756 (Fla. Dist. Ct. App.), cert. denied, 113 S. Ct. 466 (1992) 7
Stoufflet v. *Apex Towing Co.*, No. 90-4476, 1991 WL 194759 (E.D. La. Sept. 20, 1991) 7
Tarasoff v. *Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334 (1976) 18
Thyssen, Inc. v. *S.S. Fortune Star*, 777 F.2d 57 (2d Cir. 1985) 13
Vaughan v. *Atkinson*, 369 U.S. 527 (1962) 12, 13
Wangen v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980) 18
Wildman v. *Burlington N. R.R.*, 825 F.2d 1392 (9th Cir. 1987) 17

TABLE OF AUTHORITIES—Continued

Page

Williams v. *Penrod Drilling Corp.*, 845 S.W.2d 349 (Tex. Ct. App.—Beaumont 1992) 9

Statutes

33 U.S.C. § 901 *et seq.* 13
45 U.S.C. § 51 15
46 U.S.C. App. § 688 ..... *passim*
46 U.S.C. App. § 761 *et seq.* 7, 10, 15

Miscellaneous

Comment, 22 J. Mar. L. & Com. 595 (1991) 17
Ghiardi & Kircher, *Punitive Damages Law & Practice* (1985) 18
Keeton, Dobbs, Keeton & Owen, *Prosser & Keeton on the Law of Torts* (5th ed. 1984) 18
Note, Miles v. Apex Marine Corporation: *From Anomaly to Anomaly in Seamen's Remedies*, 37 Loy. L. Rev. 141 (1991) 17
Note, *Sailing the Statutory Seas Toward Uniformity in Maritime Tort Law:* Miles v. Apex Marine Corp., 15 Tul. Mar. L.J. 449 (1991) 17
Schoenbaum, *Admiralty and Maritime Law* (1987) 12

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. —'

BROWN & ROOT, INC., PETITIONER

v.

STEPHEN A. MISTICH, RESPONDENT

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

---

PETITION FOR A WRIT OF CERTIORARI

Brown & Root, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal, Fourth Circuit, State of Louisiana in this case.

OPINIONS BELOW

The opinion of the Court of Appeal (App., *infra*, 1a-35a) is reported at 609 So. 2d 921. The opinions of the district court for the Parish of Plaquemines (App., *infra*, 38a-51a) are unreported.

JURISDICTION

The order of the Supreme Court of Louisiana denying a writ of certiorari to review the judgment of the Court of Appeal was entered on March 12, 1993. App.,

infra, 37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2 of the Constitution provides:

> The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction * * *.

2. The Jones Act, 46 U.S.C. App. § 688, provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * *.

STATEMENT

This case presents an important and recurring question under federal maritime law: whether a "seaman" within the meaning of the Jones Act, 46 U.S.C. App. § 688, is entitled to recover punitive damages in an action against his employer under the general maritime law, alleging injury caused by the unseaworthiness of a vessel on which the seaman was employed. The Louisiana Court of Appeal, relying on the Fifth Circuit's decision in *In Re Merry Shipping, Inc.*, 650 F.2d 622 (1981), answered that question affirmatively, upholding a $4,000,000 punitive damages award secured by respondent, a Jones Act seaman, in his lawsuit against Brown & Root. But while the Court of Appeal's decision is consistent with the Fifth Circuit's ruling in *Merry Shipping*, it is in direct conflict with the decision of the Sixth Circuit in *Miller* v. *American President Lines, Ltd.*, Nos. 91-3602/3837 (Mar. 23, 1993), and is difficult to

reconcile with this Court's analysis in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990). The Sixth Circuit, relying on *Miles*, held in the *Miller* case that punitive damages are not available under the general maritime law in an unseaworthiness action brought by a Jones Act seaman.

This case squarely presents and is an appropriate vehicle for resolving that conflict. More generally, the case would afford the Court an opportunity to dispel widespread uncertainty among the lower courts regarding the availability of punitive damages not only in unseaworthiness cases but in other types of actions brought by Jones Act seamen against their employers. Because the Court of Appeal's decision is erroneous, and because the case presents a recurring question of manifest importance to the maritime industry, the petition for a writ of certiorari should be granted.

1. Respondent worked as a welder for Brown & Root on various pipelaying barges between 1976 and 1984. In connection with his duties, he spent a great deal of time near x-ray cameras used to examine pipe welds for defects. App., *infra*, 41a-42a. These cameras emitted gamma radiation. After developing chronic myelogenous leukemia in 1986, respondent sued Brown & Root and other former employers under the Jones Act and the general maritime law, alleging that his leukemia was the result of excessive exposure to radiation.[1] In his Jones Act claim, respondent contended that Brown & Root was negligent in failing to protect him from excessive exposure, while in his general maritime claim he alleged that Brown & Root's barges were unseaworthy because they did not provide a sufficient shield against radiation. *Id.* at 1a, 8a, 13a.

On April 28, 1989, following a bench trial, the district court for Plaquemines Parish found Brown & Root

[1] The other defendants settled before trial.

negligent and the barges unseaworthy. App., *infra*, 38a-40a. In addition to awarding compensatory damages of $3,147,608 (*id.* at 40a), the court awarded respondent $4,000,000 in punitive damages. Relying (*id.* at 45a) on the Fifth Circuit's decision in *Merry Shipping*, the trial court explained that it was "assessing an amount of punitive damages that will hopefully bring about an alteration of [Brown & Root's] pipelaying vessels to save those other workers who, like the plaintiff, may be still exposed to hazard." App., *infra*, 50a-51a.[2]

2. The Louisiana Court of Appeal reduced the award of compensatory damages but affirmed in all other respects. The court found sufficient evidence of negligence (App., *infra*, 8a-12a) and, relying on the same evidence, held that the vessels on which respondent worked were unseaworthy (*id.* at 12a-13a).

The Court of Appeal also upheld the award of punitive damages. It recognized that in *Miles* this Court had held that the damages available under the general maritime law for the death of, or injury to, a Jones Act seaman may not be more expansive than the damages available under the Jones Act. App., *infra*, 20a. Brown & Root had contended that punitive damages are unavailable under the Jones Act and thus, according to the logic of *Miles*, may not be awarded to a seaman under the general maritime law. The court not only questioned the premise of this argument (App., *infra*, 20a-21a),[3] but in

---

[2] Respondent died shortly after trial. The caption of the case in the courts below, however, was never amended to reflect a substitution of parties.

[3] Declining (App., *infra*, 21a n.4) to follow the contrary decision of the Ninth Circuit in *Kopczynski* v. *The Jacqueline*, 742 F.2d 555 (1984), cert. denied, 471 U.S. 1136 (1985), the Court of Appeal stated that "[t]here is no definitive federal or state appellate court decision in this circuit or state holding that punitive damages are not recoverable under the Jones Act, much less under the general maritime law." App., *infra*, 21a.

any event "disagree[d] with the proposition that after *Miles* punitive damages are no longer available under the general maritime law in claims based on unseaworthiness." *Id.* at 21a. Although the court recognized that *Miles* had limited a seaman's recovery under the general maritime law to "pecuniary" losses, it explained that "[p]unitive damages are in a class apart from other nonpecuniary damages" in that "[t]hey serve the purpose of punishing the particular defendant" and "deter others from following that defendant's example." App., *infra*, 21a (footnote omitted). Thus, the court continued, in contrast to the kind of nonpecuniary damages involved in *Miles*—which were "compensatory" in nature—punitive damages "are by nature non-compensatory." App., *infra*, 21a-22a. Applying that principle, the Court of Appeal sustained the punitive damages award against Brown & Root.[4]

REASONS FOR GRANTING THE PETITION

In *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990), this Court held that in determining the kinds of damages that are available under general maritime law, courts must look, first and foremost, to relevant congressional enactments. Where "Congress has spoken directly to the question of recoverable damages," the Court stated, " 'the courts are not free to "supplement" Congress' answer.' " *Id.* at 31. Only in that manner, the Court emphasized, can federal courts ensure "a uniform rule applicable to all actions for the wrongful death of a seaman." *Id.* at 33. Applying that uniformity principle, the Court held

[4] On March 12, 1993, the Supreme Court of Louisiana, with two Justices dissenting, denied Brown & Root's application for a writ of certiorari. App., *infra*, 37a. Because there is a dispute between respondent's estate and certain members of his family as to who is entitled to the proceeds of any judgment in this case, Brown & Root commenced an interpleader action in the United States District Court for the Eastern District of Louisiana, which has entered an order staying execution on the judgment pending a ruling in that proceeding.

that because the Jones Act (which covers injuries to seamen) limits recovery to pecuniary losses and thus excludes damages for loss of society—a nonpecuniary loss —such damages are not available under the general maritime law in an action for the wrongful death of a Jones Act seaman. *Id.* at 32.

The question presented in this case is whether the Court's analysis in *Miles* applies to a seaman's claim for punitive damages in an unseaworthiness action under the general maritime law. The Sixth Circuit ruled in *Miller* v. *American President Lines, Ltd.*, Nos. 91-3602/3837 (Mar. 23, 1993), that *Miles* does apply, and it therefore held that punitive damages are not available in an unseaworthiness action arising from the wrongful death of a Jones Act seaman. Other lower federal and state courts have reached the same conclusion. By contrast, the Louisiana Court of Appeal in the present case has read *Miles* more narrowly, and accordingly has joined the Fifth Circuit and other courts in upholding the availability of punitive damages in actions by seamen under the general maritime law. That conflict, moreover, is symptomatic of a wider disagreement among the federal and state courts concerning the availability of punitive damages in other types of actions brought by Jones Act seamen. In light of the sharp conflict among the Circuits and state courts—and because the question presented is both recurring and of great importance to the maritime industry—review by this Court is warranted.

A. The Court Of Appeal's Decision Is Squarely In Conflict With Those Of Other Lower Courts Holding That Punitive Damages Are Not Available In Unseaworthiness Actions Brought By Or On Behalf Of Jones Act Seamen

1. The Court of Appeal's decision in this case is squarely in conflict with the Sixth Circuit's decision in *Miller* v. *American President Lines, Ltd., supra.* In *Miller,* the personal representative of a seaman asserted

Jones Act and general maritime law claims arising from the seaman's exposure to asbestos and other toxic substances. The court of appeals set aside an award of punitive damages, holding that such damages may *not* be awarded to a Jones Act seaman under the general maritime law. The Sixth Circuit explained that "[u]nder *Miles*, * * * the goal" of a federal court sitting in admiralty "is to articulate a uniform rule regarding the availability of punitive damages in all actions for the wrongful death of a seaman." *Miller*, slip op. at 10. Toward that end, the court continued, "[w]e are to be guided primarily by the congressionally enacted plan of maritime tort law"—principally, the Jones Act and the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.* (DOHSA). *Ibid.* Because both of those statutes limit recovery to pecuniary loss, and thus preclude any recovery of punitive damages, the Sixth Circuit concluded that "punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman." *Id.* at 13-14.[5]

---

[5] Numerous federal district courts have reached the same conclusion. See *Matter of Waterman S.S. Corp.*, 780 F. Supp. 1093 (E.D. La. 1992); *Anderson* v. *Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992); *La Voie* v. *Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827 (D. Haw. 1992); *Ellison* v. *Messerschmitt-Bolkow-Blohm*, 807 F. Supp. 39 (E.D. Tex. 1992); *Haltom* v. *Lykes Bros. S.S. Co.*, 771 F. Supp. 179 (E.D. Tex. 1991); *Rollins* v *Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991); *Matter of Mardoc Asbestos Cases*, 768 F. Supp. 595 (E.D. Mich. 1991); *Complaint of Aleutian Enter., Ltd.*, 777 F. Supp. 793 (W.D. Wash. 1991); *Howard* v. *Atlantic Pac. Marine Corp.*, No. 89-3073, 1992 WL 55487 (E.D. La. Feb. 28, 1992); *Stoufflet* v. *Apex Towing Co.*, No. 90-4476, 1991 WL 194759 (E.D. La. Sept. 20, 1991); *Donaghey* v. *ODECO*, No. 90-0163, 1991 WL 99493 (E.D. La. June 5, 1991), rev'd on other grounds, 974 F.2d 646 (5th Cir. 1992); *Ryan* v. *Transworld Drilling Co.*, No. 91-1110, 1991 WL 278674 (E.D. La. Dec. 20, 1991); *Brumfield* v. *Zapata Gulf Marine Corp.*, No. 90-1319, 1991 WL 174818 (E.D. La. Aug. 28, 1991); *Rowan Cos.* v. *Badeaux*, Nos. 90-0370, 90-0756, 1991 WL 175541 (E.D. La. Aug. 29, 1991). So has at least one intermediate state appellate court. See *Sky Cruises, Ltd.* v. *Andersen*, 592 So. 2d 756 (Fla. Dist. Ct. App.), cert. denied, 113 S. Ct. 466 (1992).

The decision below is directly in conflict with *Miller*. In contrast to the Sixth Circuit, the Louisiana Court of Appeal held that punitive damages *are* available under the general maritime law in a seaman's claim based on unseaworthiness. Indeed, it explicitly "disagree[d] with the proposition that after *Miles* punitive damages are no longer available under the general maritime law in claims based on unseaworthiness." App., *infra*, 21a.[6]

The Fifth Circuit in *Merry Shipping*—on which the Louisiana Court of Appeal relied (App., *infra*, 20a-22a)—also upheld the availability of punitive damages in an unseaworthiness action brought on behalf of a Jones Act seaman. The Fifth Circuit acknowledged that "[d]oubt exists" as to whether punitive damages are available under the Jones Act. 650 F.2d at 626. Nevertheless, the court stated, "[i]t does not follow * * * that if punitive damages are not allowed under the Jones Act, they should also not be allowed under general maritime law." *Ibid.* To the contrary, the court reasoned, because general maritime law "is wholly a product of judicial decisionmaking, fashioned on the basis of tradition and policy," courts are free from any "statutory restraints" that might otherwise "bar recovery." *Ibid.* Surveying prior case law, the court of appeals concluded that "in this Circuit punitive damages may be recovered under general maritime law * * *." *Ibid.*

More recently, the Supreme Court of Alaska articulated the same view. In *Brown* v. *State of Alaska*, 816 P.2d 1368 (1991), a seaman sued his employer under the Jones Act and general maritime law for injuries suffered in the course of his employment as a marine engineer. Relying on the Fifth Circuit's decision in *Merry Shipping*, the Alaska Supreme Court ruled that the

---

[6] The same conclusion has been reached by another Louisiana Court of Appeal. See *Jenkins* v. *Kerr-McGee Corp.*, 613 So. 2d 1097, 1107 (La. Ct. App. 1993) (accepting the availability of punitive damages in a general maritime claim, but finding that such damages were not warranted on the facts there presented).

"[d]amages recoverable under th[e] doctrine [of unseaworthiness] include pecuniary and nonpecuniary losses, as well as punitive damages under some circumstances." *Id.* at 1372.

The Texas Court of Civil Appeals in Beaumont—a court that frequently entertains maritime claims—has also recently upheld the availability of punitive damages in a seaman's action under the general maritime law. In *Williams* v. *Penrod Drilling Corp.*, 845 S.W.2d 349 (Tex. Ct. App.—Beaumont 1992), as in the present case, the plaintiff brought an action alleging negligence under the Jones Act and unseaworthiness under the general maritime law. Although the court accepted the view that punitive damages are not available under the Jones Act, it stated that it could find no Supreme Court or Fifth Circuit authority expressly disapproving the availability of punitive damages in an unseaworthiness claim. The court therefore followed *Merry Shipping* and held that seamen are entitled to recover punitive damages under the general maritime law. 845 S.W.2d at 351-352.[7]

Complicating matters still further, the Ninth Circuit has staked out something of a middle position. Where a seaman (or his survivor or representative) alleges *only* a general maritime law claim, the Ninth Circuit has held that punitive damages may be recovered. See *Evich* v. *Morris*, 819 F.2d 256, cert. denied, 484 U.S. 914 (1987); *Protectus Alpha Navigation Co., Ltd.* v. *North*

---

[7] See also *Logue* v. *Tidewater, Inc.*, No. 91-1109, 1992 WL 59409 (E.D. La. Mar. 17, 1992); *Davis* v. *Penrod Drilling Corp.*, No. 91-1458, 1991 WL 264541 (E.D. La. Dec. 2, 1991); *Hannon* v. *Waterman S.S. Corp.*, No. 90-1175, 1991 U.S. Dist. LEXIS 6823 (E.D. La. May 21, 1991); *Baptiste* v. *Superior Court*, 106 Cal. App. 3d 87, 164 Cal. Rptr. 789 (1980). Cf. *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987) (recognizing availability of punitive damages in an action alleging negligence and unseaworthiness), cert. denied, 486 U.S. 1033 (1988); *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir.), cert. denied, 409 U.S. 932 (1972) (same).

Pac. Grain Growers, Inc., 767 F.2d 1379 (1985). On the other hand, in *Bergen* v. *F/V St. Patrick*, 816 F.2d 1345 (1987), cert. denied, 493 U.S. 871 (1989), the Ninth Circuit held that punitive damages are *not* available to a seaman who joins a general maritime law claim of unseaworthiness with statutory claims under the Jones Act and DOHSA. Moreover, expressly noting a conflict among the circuits (816 F.2d at 1347 n.1), the Ninth Circuit observed in *Bergen* that it is "not entirely clear" that punitive damages could be recovered where a plaintiff asserts no DOHSA claim, but only general maritime law and Jones Act claims. *Ibid.* That, of course, is exactly the situation here, as respondent joined claims under the Jones Act and the general maritime law.[8]

In short, the question presented in this case—whether a Jones Act seaman may recover punitive damages in an unseaworthiness claim under the general maritime law—continues to divide the federal circuits and state courts.

---

[8] Justice White voted to grant certiorari in the *Bergen* case precisely to resolve the conflict between the Ninth Circuit's decision in *Bergen* and the Fifth Circuit's decision in *Merry Shipping*. See *McMonagle* v. *Northeast Women's Center, Inc.*, 493 U.S. 901, 902 (1989) (White, J., dissenting from denial of certiorari and noting his dissent from the denial of certiorari in several other cases, including *Bergen*). The case for review here is stronger, in two important respects, than it was in *Bergen*. First, the very recent decision of the Sixth Circuit in *Miller*, coupled with similar state court and district court decisions, deepens the conflict among the lower courts over the question presented. Second, the relevant facts and claims in the present case (and in the Fifth Circuit's *Merry Shipping* case) are identical to those in the Sixth Circuit's *Miller* decision, thus posing the conflict squarely. By contrast, the seaman's action in *Bergen* was complicated by the joinder of a DOHSA claim, which was not presented in *Merry Shipping* or in this case. Thus, although the Ninth Circuit questioned whether punitive damages would be available in a case lacking a DOHSA claim, it did not expressly resolve that issue and thus did not squarely reject the result in *Merry Shipping*.

Further review by this Court is warranted to resolve that conflict.[9]

2. The conflict concerning the availability of punitive damages in unseaworthiness claims is symptomatic of a wider disagreement among the lower federal courts and state courts concerning the general availability of punitive damages in lawsuits brought by seamen against their employers. In addition to unseaworthiness claims, seamen often bring suits under the Jones Act and the general maritime law based on injuries resulting from an employer's failure to pay maintenance and cure. The lower federal courts are sharply divided over whether punitive damages are available under the general maritime law in maintenance and cure cases, and the ruling sought by petitioner on the question presented in this case would almost certainly resolve that conflict.

---

[9] Further review would also give the Court an opportunity to clarify the status of punitive damages under the Jones Act itself, an issue about which the lower courts have manifested uncertainty. Because the argument based on *Miles* (which we develop below) proceeds from the predicate that punitive damages are not available under the Jones Act, resolving the question presented in this case would almost certainly require the Court to address and clarify the scope of damages available under that statute. The court below refused to accept Brown & Root's contention that punitive damages are not available under the Jones Act, stating that it could locate "no definitive federal or state appellate court decision in this circuit or state holding that punitive damages are not recoverable under the Jones Act * * *" (App., *infra*, 21a). The Fifth Circuit in *Merry Shipping* took the same view, although it recognized that there is at least some "doubt" as to the availability of punitive damages under the Jones Act. 650 F.2d at 626. By contrast, the Ninth and Sixth Circuits have expressly held that punitive damages are not available under the Jones Act. See *Kopczynski* v. *The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), cert. denied, 471 U.S. 1136 (1985) (punitive damages are nonpecuniary and therefore not available under the Jones Act); *Miller*, slip op. at 10 (same). Several district courts have reached the same conclusion. See *Anderson* v. *Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992); *Matter of Waterman S.S. Corp.*, 780 F. Supp. 1093 (E.D. La. 1992); *Complaint of Aleutian Enter., Ltd.*, 777 F. Supp. 793 (W.D. Wash. 1991); *Rollins* v. *Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991).

It has long been settled that a seaman who is injured because of his employer's negligent failure to pay maintenance and cure may sue under the Jones Act, and that his personal representative may sue if the failure results in wrongful death. *Cortes* v. *Baltimore Insular Lines, Inc.*, 287 U.S. 367, 376 (1932).[10] The damages recoverable in such suits—like the damages recoverable in any Jones Act suit—are limited to pecuniary loss. But a seaman may also bring an action under the general maritime law for failure to pay maintenance and cure. And there lies the conflict among the courts of appeals—whether punitive damages are available in general maritime law actions for failure to pay maintenance and cure.

The First Circuit has held that punitive damages may be awarded in such actions. *Robinson* v. *Pocahontas, Inc.*, 477 F.2d 1048 (1973). The plaintiff in *Robinson*, a seaman, brought an action for negligence under the Jones Act and for unseaworthiness and maintenance and cure under the general maritime law. Plaintiff recovered an award of punitive damages on the latter claim, which arose from the defendant's failure to pay the plaintiff's medical bills incurred as a result of an on-the-job injury. The First Circuit upheld the award. Relying principally on the dissenting opinion in *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962), the court dismissed as "without merit" the defendant's contention that punitive damages were unavailable as a matter of law. 477 F.2d at 1051.

By contrast, the Second Circuit has held that punitive damages are *not* available in such maintenance and cure

---

[10] The ancient duties of a shipowner to provide "maintenance and cure" embody the obligation to provide a seaman who falls ill with, respectively, food and lodging and necessary medical services. See generally Schoenbaum, *Admiralty and Maritime Law* § 5-2 (1987). In *Cortes*, the Court held that a seaman's representative (who at that time could not bring a wrongful death action under the general maritime law) could sue under the Jones Act for the shipowner's alleged negligence in failing to provide the decedent with medical services on board ship. 287 U.S. at 376.

cases, over and above an award of counsel fees. *Kraljic* v. *Berman Enters., Inc.*, 575 F.2d 412 (1978). The court explained that in the *Vaughan* case, "Mr. Justice Douglas, writing for the majority, held that in an action for maintenance and cure the seaman is entitled not only to a recovery of his actual damages but also to an award of counsel fees where the defendant's default is 'callous' or 'willful and persistent.'" *Id.* at 413. The court recognized that the First Circuit had gone further than that in *Robinson*, but it disagreed with that result. "The obvious difficulty with [the First Circuit's] approach," the court observed, "is that the court followed the views of the dissenters in [*Vaughan* v.] *Atkinson* and not the majority." *Id.* at 415. Accord, *Thyssen, Inc.* v. *S.S. Fortune Star*, 777 F.2d 57, 62 n.6 (2d Cir. 1985); *Incandela* v. *American Dredging Co.*, 659 F.2d 11, 15 n.3 (2d Cir. 1981).

More recently, the Fifth and Eleventh Circuits have weighed in on the side of the First Circuit, thus substantially deepening the conflict. In *Holmes* v. *J. Ray McDermott & Co.*, 734 F.2d 1110 (1984), the Fifth Circuit, citing *Robinson*, held that punitive damages are available under the general maritime law for willful and arbitrary refusal to pay maintenance and cure. *Id.* at 1118. Accord, *Morales* v. *Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987); *Harper* v. *Zapata Off-Shore Co.*, 741 F.2d 87 (5th Cir. 1984). Similarly, in *Hines* v. *J.A. Laporte, Inc.*, 820 F.2d 1187 (1987), the Eleventh Circuit, noting that the "Circuits are divided" on the question, held that in general maritime law actions for maintenance and cure "both reasonable attorney's fees and punitive damages may be legally awarded in a proper case." *Id.* at 1189.[11]

[11] Dictum in a Ninth Circuit case brought under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, stated that punitive damages are available in some cases for failure to pay maintenance and cure. *Sample* v. *Johnson*, 771 F.2d 1335 (1985), cert. denied, 475 U.S. 1019 (1986). In the absence of a definitive decision from that Circuit, district courts—including two

Although the present case does not involve maintenance and cure, the ruling sought by Brown & Root would substantially resolve that unsettled issue. As we explain at greater length in the discussion that follows, *Miles* stands for the proposition that if a seaman has a cause of action for his injuries under the Jones Act, then courts must look to the Jones Act in determining the damages recoverable in a parallel action under the general maritime law. That principle holds true whether the seaman sues for injuries due to unseaworthiness (as in this case) or for injuries due to the withholding of maintenance and cure. A ruling by this Court on the question presented will likely resolve *each* of these unsettled issues concerning the availability of punitive damages in lawsuits brought by Jones Act seamen against their employers.

B. The Decision Below Is Inconsistent With *Miles*

1. As the Sixth Circuit recognized in *Miller*, the conclusion that a seaman may obtain punitive damages under the general maritime law is difficult to square with this Court's decision in *Miles*. In *Miles*, the Court unanimously held that the representative of a Jones Act seaman could not recover damages for loss of society in a general maritime law wrongful death action based on unseaworthiness. 498 U.S. at 32. The Court explained that Congress and the states have legislated extensively in the field of maritime law, thus obviating the need for injured seamen and their loved ones to seek relief solely under the general admiralty jurisdiction. *Ibid.* "In this era," the Court stated, "an admiralty court should look

---

in the same state—have reached opposite conclusions. Compare *Ridenour* v. *Holland Am. Line Westours, Inc.*, 806 F. Supp. 910 (W.D. Wash. 1992) (punitive damages are available in a general maritime law action for failure to pay maintenance and cure) and *Nelsen* v. *Research Corp. of Univ. of Hawaii*, 805 F. Supp. 837 (D. Haw. 1992) (same), with *La Voie* v. *Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827 (D. Haw. 1992) (punitive damages are not available).

primarily to * * * legislative enactments for policy guidance." While courts "may supplement these statutory remedies" in order to promote uniformity, they must "keep strictly within the limits imposed by Congress," which "retains superior authority in these matters." *Id.* at 27.[12]

Applying that principle, the Court explained that because the Jones Act provides a seaman's representative with a cause of action for wrongful death, an admiralty court must look to the Jones Act in determining the available remedies in wrongful death claims under the general maritime law. Under the Jones Act, the Court noted, only pecuniary losses may be recovered.[13] Because damages for nonpecuniary losses are unavailable under the

---

[12] The Court noted that this approach to remedies under the general maritime law was consistent with its prior decisions in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), and *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978). In *Moragne*, the Court, finding that the Jones Act and DOHSA indicated a congressional policy in favor of wrongful death actions, held that it would not be inconsistent with those statutes to create a wrongful death action under the general maritime law. 398 U.S. at 399-401. The Court applied the same principle in *Higginbotham*, again looking to statutory law as the source of rights and remedies under the general maritime law. In that case, the Court held that because DOHSA expressly provides for the recovery only of pecuniary losses for the survivors of persons killed on the high seas, survivors bringing a general maritime action may not recover damages for loss of society. 436 U.S. at 623. The Court explained that Congress has "struck the balance" regarding the availability of damages for loss of society, and thus it would be improper for an admiralty court to supplement the statutory remedial scheme with a broader measure of damages. *Ibid.*

[13] The Court observed that the Jones Act does not explicitly state the types of damages that are recoverable, but instead incorporates the substantive recovery provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51. See 46 U.S.C. App. § 688(a). The Court explained that the FELA had long ago been construed as limiting recovery to pecuniary losses and concluded that Congress was presumed to have incorporated this limitation into the Jones Act. *Miles*, 498 U.S. at 32.

Jones Act, the Court concluded that nonpecuniary losses —such as the loss of society at issue in *Miles*—are likewise not compensable under the general maritime law. *Id.* at 32. Courts are not free to design maritime law recoveries as they see fit: "It would be inconsistent with [the Court's] place in the constitutional scheme * * * to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33.

2. The Louisiana Court of Appeal adopted a narrow reading of this Court's decision in *Miles*. The court noted (App., *infra*, 21a) that *Miles* does not, by its terms, address the availability of punitive damages under the general maritime law. Having read *Miles* narrowly, the Court of Appeal "disagree[d] with the proposition that after *Miles* punitive damages are no longer available under the general maritime law in claims based on unseaworthiness." *Ibid.*

The Court of Appeal is, of course, quite correct that *Miles* involved damages for loss of society, not punitive damages. Thus, like the court below, we recognize that the present case is not controlled *a fortiori* by *Miles*. Nevertheless, like the Sixth Circuit in *Miller*, we believe that the "fundamental principle" of *Miles*—that "an admiralty court should look primarily to * * * legislative enactments for policy guidance" (498 U.S. at 27)—is fully applicable to the present case. As in *Miles*, the starting point in this case must be the Jones Act, the federal statute that provided respondent with a cause of action for his injuries. To determine whether punitive damages were available to respondent, the Louisiana Court of Appeal should have looked, first and foremost, to the availability of such relief under the Jones Act.

Had the Court of Appeal done so, it would not have ruled as it did. As noted above (*supra*, at 11 n.9), the only Circuits to have directly confronted the issue have

squarely held that punitive damages are not available under the Jones Act. See *Miller*, slip op. at 13-14; *Kopczynski*, 742 F.2d at 561.[14] Moreover, as the Court explained in *Miles*, "the Jones Act makes applicable to seamen the substantive recovery provisions of the older FELA," which, in the Court's decision in *Michigan Central R.R.* v. *Vreeland*, 227 U.S. 59 (1913), "had been interpreted as providing recovery only for pecuniary loss." 498 U.S. at 32. Under that "pecuniary loss" limitation, it is well settled that the FELA does not permit recovery of punitive damages. *Wildman* v. *Burlington N. R.R.*, 825 F.2d 1392 (9th Cir. 1987); *Kozar* v. *Chesapeake & Ohio Ry.*, 449 F.2d 1238 (6th Cir. 1971). Because the Jones Act must "incorporate the pecuniary limitation on damages as well" (*Miles*, 498 U.S. at 32), it cannot be read to authorize the recovery of punitive damages.[15]

The Court of Appeal suggested, however, that although the Jones Act does not "afford[] recovery for non-pecuniary damages such as loss of society" (App., *infra*, 20a), punitive damages are another matter entirely. "Punitive damages," the Court of Appeal opined, "are

---

[14] The Louisiana Court of Appeal regarded this as an unsettled question, having failed to locate any "definitive federal or state appellate court decision in this circuit or state holding that punitive damages are not recoverable under the Jones Act * * *" (App., *infra*, 21a).

[15] See also Comment, 22 J. Mar. L. & Com. 596, 606 (1991) (since punitive damages are unavailable under the Jones Act, *Miles* precludes their award in general maritime claims); Note, Miles v. Apex Marine Corporation: *From Anomaly to Anomaly in Seamen's Remedies*, 37 Loy. L. Rev. 141, 152-153 (1991) (because Congress has shown its intent to proscribe punitive damages under the Jones Act, *Miles* requires that punitive damages be unavailable under the general maritime law). Cf. Note, *Sailing the Statutory Seas Toward Uniformity in Maritime Tort Law:* Miles v. Apex Marine Corp., 15 Tul. Mar. L.J. 449, 463 (1991) (predicting that courts would interpret *Miles* as precluding punitive damages in both Jones Act and unseaworthiness actions).

in a class apart from other non-pecuniary damages." *Id.* at 21a. In particular, the court stated, "unlike the damages for loss of society addressed in *Miles*, and similar non-pecuniary but compensatory damages, punitive damages are by nature non-compensatory." *Id.* at 21a-22a.

The court's effort to distinguish *Miles* is, in our view, problematical. As *Miles* makes clear, the Jones Act—and thus the general maritime law, when invoked by a seaman in an unseaworthiness claim against his employer—limits recovery to *pecuniary* losses. While punitive damages may differ from other kinds of recoveries, they nonetheless do *not* compensate for *pecuniary losses*. And under *Miles*, that should settle the issue: because *only* pecuniary losses are recoverable under the Jones Act, punitive damages—however distinguishable from other categories of nonpecuniary awards—may not be granted under the general maritime law in an action brought by a Jones Act seaman.[16]

---

[16] Needless to say, punitive damages do not measure "pecuniary" loss in any sense. As this Court made clear in *Vreeland*—the case that established the "pecuniary" limitation on FELA awards—a pecuniary loss is some quantifiable measure of "assistance or support of which [the beneficiaries] have been deprived," such as the loss of services of a wife, husband or child; or, when the beneficiary is a child, the loss of "care, counsel, training and education which [the child] might * * * have reasonably received from the parent." 227 U.S. at 70-71. Not surprisingly, courts construing wrongful death statutes that provide for recovery of pecuniary losses have consistently held that those statutes do not allow recovery for punitive damages. See, *e.g.*, *Tarasoff* v. *Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334 (1976); *Rubeck* v. *Huffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978); *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980). See generally 1 Ghiardi & Kircher, *Punitive Damages Law & Practice* § 5.19 (1985); Keeton, Dobbs, Keeton & Owen, *Prosser & Keeton on the Law of Torts* § 127, at 951 (5th ed. 1984). And these decisions comport with the generally understood nature of punitive damages—which do not compensate for any "pecuniary" loss, and indeed often may exceed actual loss by many orders of magnitude. See generally *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1044 (1991);

C. The Question Presented Is One Of Recurring Importance To The Maritime Industry

Finally, apart from the underlying conflict, the question presented is one of substantial importance to the maritime community. The decision below, from a State that has both a large admiralty docket and a great deal of influence on admiralty law, represents an important (but, in our view, erroneous) pronouncement on the proper approach to assessing damages under the general maritime law.[17] Moreover, the question whether punitive damages are available in general maritime law claims plainly is a recurring one, with federal courts having published at least 17 opinions in the two and one-half years since *Miles* was decided involving the rights of seamen to seek punitive damages.

More generally, because the decision to award punitive damages—and if so, how much—"has been always left to the discretion of the jury" (*Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)), and appears all too often to "'run wild'" (*Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991)), the question presented has important economic consequences for the maritime industry.[18] "The impact" of punitive damages "is likely to be both unpredictable and, at times, substantial." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-271 (1981). As the phenomenon of punitive damages grows, the frequency with which they will be

---

Memphis Community School Dist. v. *Stachura*, 477 U.S. 299, 306 n.9 (1986).

[17] The Texas courts in the Gulf Coast region also have a substantial number of maritime cases, and, as noted previously (*supra*, at 9), an intermediate state appellate court in that region has reached the same result as the Louisiana Court of Appeal.

[18] A seamen who alleges claims under both the Jones Act and the general maritime law may obtain a jury trial if he so chooses. *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16 (1963).

sought by injured seamen will increase and the issue presented here will assume even greater significance. It will therefore be both useful and timely for the Court to decide it now.

Finally, the availability of punitive damages under the general maritime law should not vary according to the forum in which the plaintiff sues. To the contrary, admiralty rules should reflect "a system of law coextensive with, and operating uniformly in, the whole country." *Miles*, 498 U.S. at 27 (internal quotations omitted). This case is an appropriate vehicle for clarifying the governing standard and resolving the conflict among the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES F. HOLMES
ELLEN B. WOODY
Christovich & Kearney
2300 Pan American Life Center
601 Poydras St.
New Orleans, LA 70130
(504) 561-7300

ANDREW L. FREY
Counsel of Record
LAWRENCE S. ROBBINS
GARY A. WINTERS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602
Counsel for Petitioner
Brown & Root, Inc.

APRIL 1993